Aaron A. Payment,
MPA, MEd, EdD

Tribal Chairperson

Address:
523 Ashmun St.
Sault Ste. Marie,
MI 49783

Phone:
906.440.5937
Email
aaronpayment@saulttribe.net

FaceBook
'Aaron Payment'

TESTIMONY

Families, Children, and Seniors Committee
Michigan House of Representatives
(January 18, 2018)

Good morning Madam Chair and esteemed members of the Families, Children, and Seniors Committee of the State of Michigan House of Representatives. My name is Aaron Payment. I am Chairperson of the Sault Ste. Marie Tribe of Chippewa Indians. I testify on behalf of Sault Tribe today regarding proposed legislation that would allow the Sault Tribe access to pre-petition/pre-removal information regarding Indian children with whom the State of Michigan is investigating, has substantiated an investigation, and/or is engaging in services. Sault Tribe supports the legislation going forward in the form as agreed to by the United Tribes of Michigan:

> (X) A TRIBAL REPRESENTATIVE, AGENCY, OR ORGANIZATION, INCLUDING A MULTIDISCIPLINARY TEAM, AUTHORIZED BY THE INDIAN CHILD'S TRIBE, AS DEFINED BY MCL 712B.3(l), TO CARE FOR, DIAGNOSE, TREAT, REVIEW, EVALUATE, OR MONITOR ACTIVE EFFORTS AS DESCRIBED WITHIN SECTION 3 OF CHAPTER XIIB OF THE PROBATE CODE OF 1939, 1939 PA 288, MCL 712B.3(a), REGARDING AN INDIAN CHILD, PARENT, OR INDIAN CUSTODIAN, AS DEFINED WITHIN MCL 712B.3.

Or, as modified by the Legislative Services Bureau:

> (X) A TRIBAL REPRESENTATIVE, AGENCY, OR ORGANIZATION, INCLUDING A MULTIDISCIPLINARY TEAM, AUTHORIZED BY THE INDIAN CHILD'S TRIBE, TO CARE FOR, DIAGNOSE, TREAT, REVIEW, EVALUATE, OR MONITOR ACTIVE EFFORTS REGARD- ING AN INDIAN CHILD, PARENT, OR INDIAN CUSTODIAN, AS USED IN THIS SUBDIVISION, "ACTIVE EFFORTS", "INDIAN CHILD", "INDIAN CHILD'S TRIBE", "INDIAN CUSTODIAN", AND "PARENT" MEAN THOSE TERMS AS DEFINED IN SECTION 3 OF CHAPTER XIIB OF THE PROBATE CODE OF 1939, 1939 PA 288, MCL 712B.3.

Background:

"The Indian Child Welfare Act (ICWA) addresses a long-critical problem. For decades, non-Indian social workers have typically evaluated Indian family problems from their own cultural perspectives. Ignorance of Indian traditions and values, combined with racism and ethnocentrism, have resulted in the tragic separation of large numbers of Indian children from their families and communities." *They Are Young Once But Indian Forever: A Summary and Analysis of Investigative Hearings on Indian Child Welfare, April 1980*, Joseph A. Myers (American Indian Lawyer Training Program (December 1981).

The Act recognizes:

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families (25 USC 1901).

The United States Congress' policy as stated in ICWA is:

> To protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs (25 USC 1902).

"To bring an end to the separation of Indian children from their families, Congress restricted dramatically the role of the states in Indian child welfare proceedings, affirming and increasing the role of the tribes and their governmental units." Myers, at 57. Although the

number of removals of Indian children have decreased since the enactment of ICWA almost forty years ago, the number of removals of Indian children are still significantly higher than for other children and the continued protections are necessary.

Research and data from states tell us that American Indian/Alaska Native (AI/AN) children are disproportionately represented (or overrepresented) in the child welfare system nationwide, especially in foster care. This means that higher percentages of AI/AN children are found in the child welfare system than in the general population. The overrepresentation of AI/AN children often starts with reports of abuse and neglect at rates proportionate to their population numbers, but grows higher at each major decision point from investigation to placement, culminating in the overrepresentation of AI/AN children in placements outside the home. One study found that, due in large part to systematic bias, where abuse has been reported AI/AN children are 2 times more likely to be investigated, 2 times more likely to have allegations of abuse substantiated, and 4 times more likely to be placed in foster care than White children.

2017 Report on Disproportionality of Placements of Indian Children, NICWA, posted October 5, 2017, (citing, Hill, R. B. Casey-Center for the Study of Social Policy Alliance for Racial Equity in Child Welfare, Race Matters Consortium Westat. (2007). *An analysis of racial/ethnic disproportionality and disparity at the national, state, and county levels*. Seattle, WA: Casey Family Programs.) https://icwa.narf.org/news/2534

Best Interest of Indian Children in Michigan:

Where issues concern Indian children, the Michigan Indian Family Preservation Act (MIFPA) states Indian tribes know what is in the best interests of their children. MCL 712B.5. "In Indian child custody proceedings, the best interests of the Indian child shall be determined, in consultation with the Indian child's tribe, in accordance with the Indian child welfare act. . ." MCL 712B.5. Sault Tribe believes it is imperative that MDHHS consult with the Indian child's tribe when working with the child's family offering preventative services or otherwise attempting to prevent a removal and when determining what is in the best interests of Indian

children is important. The propose language would allow MDHHS to engage in that consultation.

Jurisdiction:

ICWA gives Indian tribes exclusive jurisdiction over children residing or domiciled on tribal lands and gives "concurrent, but presumptively tribal jurisdiction in the case of children not domiciled on the reservation." *Miss. Band of Choctaw Indians v Holyfield*, 490 US 30, 36; 109 S. Ct. 1597 (1989). When a state, tribe or other government has jurisdiction over its individuals and issues, it is not only the court in that government, but the government itself who has jurisdiction. Thus, Sault Tribe has concurrent, but presumptively tribal jurisdiction over the children and families with whom the state also has concurrent jurisdiction. MDHHS is the State of Michigan's mechanism to exercise that jurisdiction over, engage and protect those children and families. The chosen mechanism of each tribe to serve those functions--exercise jurisdiction, engage and protect children—will vary among the tribes; however, Sault Tribe is extremely vested in exercising that jurisdiction when and how it is able to do so. The proposed language would explicitly allow each sovereign nation—federally recognized Indian tribe—determine its own mechanism to engage in those discussions and consultations.

Current Issue:

The law requires the state to involve the Indian child's tribe in efforts to prevent the breakup of Indian families that in the majority of cases would occur prior to removal, however, MDHHS states they cannot provide tribes any information about the tribal families they are working with until a court action commences (MDHHS Communication Issuance 17-0065, May 30, 2017). Federal Indian Child Protection and Family Violence Prevention law provides: [A]gencies of any Indian tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of children may provide information and records to those agencies of any Indian tribe, any State, or the Federal Government that need to know the information in

performance of their duties. For purposes of this section, Indian tribal governments shall be treated the same as other Federal Government entities.

25 USC 3205

The proposed language would allow MDHHS to provide the tribes with the child protection services information MDHHS has previously indicated it is willing to share with the federally recognized Indian tribes but for their interpretation of the law.

Active Efforts-State working with Tribes at the pre-removal stage:

Access to pre-removal information is necessary in order for MDHHS to engage tribes through the provision of active efforts to prevent the breakup of the Indian family. Due to the fact that Indian tribes and states share jurisdiction where Indian children are concerned, tribes are to be consulted and communicated with regarding the issues surrounding Indian children and their families. Tribes need to have access to all the information regarding their children if they are to be informed, meaningful and respected partners with the state to prevent removals.

Sault Tribe takes its role serious to help prevent the break-up of Indian families, and is appreciative that MIFPA and the recent Federal Rule (25 CFR 23) require MDHHS to engage the tribe through active efforts and make preventing removals one of the primary goals of the law. MCL 712B.3(a); 25 CFR 23.2 (81 FR 38865). Sault tribe, when engaged by MDHHS prior to a removal, can collaborate with MDHHS to prevent the breakup of its Indian families through discussions regarding culturally appropriate services. MCL 712B.3(a)(1).

The Final Rule states "active efforts means affirmative, active, thorough and timely efforts intended primarily to *maintain* or reunite an Indian child with his or her family." 25 CFR 23.2 (81FR 38865) (emphasis added). "To the *maximum* extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and

the Indian child's parents, extended family members, Indian custodians, and Tribe." Id (emphasis added).

Upon request (such a request is required under MIFPA), the tribe may evaluate the circumstances of the Indian child's family and assist in developing a case plan that uses the resources of the Indian tribe and Indian community as expressed by the creators of the Michigan Indian Family Preservation Act. MCL 712B.3(a)(iv). The Indian tribes have substantial knowledge of the prevailing social and cultural standards and child rearing practices within the tribal communities and are uniquely qualified to assist the state in making determinations regarding appropriate services and barriers. MCL 712B.3(a)(iv). Upon invitation (such an invitation is required under MIFPA), the tribe may participate in all aspects of the Indian child custody proceeding *at the earliest point possible* in the proceeding and to give advice that is to be actively solicited. MCL 712B.3(a)(vi) (emphasis added).

The tribe can assist to identify extended family members, to provide support, to assure cultural connections, and to locate placement resources for the Indian child. MCL 712B.3(a)(vii). The tribe, when evaluating the circumstances or goals of the Indian child's family in order to determine what assistance may enable family members to participate, may request particular assistance on behalf of the family. MCL 712B.3(a)(viii). The tribe can provide information regarding preservation strategies to ensure those strategies are culturally appropriate to the Indian child's tribe. MCL 712B.3(a)(ix).

The law—MIFPA, ICWA, and the Final Rule—clearly outline three different affirmative duties of MDHHS when working with tribal families. One: upon having a reason to believe a child is an Indian child, potential Indian tribes must be contacted to confirm if the child is enrolled or eligible for enrollment with the tribe. MCL 712B.9. Two: active efforts must be engaged in with the Indian tribe prior to removal in an effort to prevent the breakup of the Indian family as described above. MCL 712B.3(a). Three: official notice via registered mail

must be sent to the Indian tribe, parent and Indian custodian at the time a petition is filed. MCL 712B.9(1). These laws also require due diligence be made to determine, document, and contact the child's extended family members in efforts to find placements for an Indian child, and include a requirement that determinations and documentation be conducted in consultation with the child or parent's tribe. MCL 712B.9(7); MCL 712B.23(7), (8) and (10). Many of the active efforts and placement activities occurring between the Indian child's tribes and MDHHS must necessarily take place pre-removal. There is no stage, other than pre-removal, where the goal is to prevent the break-up of the Indian child's family. The other stages are all focused on reunification of the family after the prevention of the break-up of the family has failed.

A policy that prevents the tribes from having information prior to removals to exercise the rights and fulfill the tasks outlined in the law, also prevents MDHHS from performing their duties under the law. MDHHS has indicated to the tribes that it believes MDHHS is able to determine what the culturally appropriate services are for each of the tribes in Michigan. This ideology should not be allowed to prevail or take root in Michigan government; it is this ideology that was pervasive in this country previously and the aftermath of that ideology was what moved the United States Congress to action when it created ICWA almost 40 years ago.

The proposed language allows each Indian tribe to determine based on their own sovereignty, laws, structure, and concurrent jurisdiction over their citizens who within the tribe should be able to receive the child protection services information from MDHHS. The proposed language allows each tribe to determine its level of need and purpose for which the information is required. It is not for MDHHS to determine what mechanism each tribe chooses to receive the sought after information regarding the prevention the removals of Indian children and it is not for MDHHS to limit the release of the information to each tribe based on the purpose for which MDHHS believes each tribe should have for the information, so long as the purpose is within the scope of the law.

Conclusion:

When the tribe is not involved in the pre-removal process and excluded from information regarding its children and their circumstances, it is impossible for the tribe to evaluate plans, make recommendations, suggest services, identify strategies, provide placement resources, or support the assertion that active efforts to prevent removal were provided. By not including the tribes, pre-removal or at the earliest possible time, many children will be removed when removal could have been avoided; many children may be required to remain in unsafe conditions when the efforts required were not made; and the advancements made in the State of Michigan in this area by decades of hard work between Michigan and the federally recognized Indian tribes found within its borders will be compromised.

Sault Tribe supports the proposed language to allow federally recognized Indian tribes to have access to the child protection services information and appreciates the opportunity to provide this information today.

Thank you.

Respectfully submitted,

Aaron A. Payment

Aaron A. Payment

United Tribes of Michigan

5453 Hughston Rd, Harbor Springs, Michigan 49740
Phone: 517-802-8650 --- Email: fettawa@charter.net

Frank Ettawageshik, Executive Director

RESOLUTION # 054 20171012

United Tribes of Michigan support for Michigan Senate Bill No. 616

WHEREAS, the membership of United Tribes of Michigan (UTM) is open to all of the twelve federally recognized tribes located in Michigan; and

WHEREAS, the organization provides a forum for the Tribes in Michigan to address issues of common concern and is committed to join forces to advance, protect, preserve and enhance the mutual interests, treaty rights, sovereignty, and cultural way of life of the sovereign Indian Tribes of Michigan throughout the next seven generations; and

WHEREAS, the inherent sovereign rights of Tribal governments are advanced within their respective Constitutions and Laws, and are supported within provisions of the Constitution of the United States, and within the United Nations Declaration on the Rights of Indigenous Peoples and subsequent international actions; and

WHEREAS, UTM accepts the mission to engage, as a matter of mutual concern, issues that impact the health, security, safety, and general welfare of Native Americans; and

WHEREAS, pursuant to the provisions of the Child Protection Law, MCL 722.621 et seq, the Michigan Department of Health and Human Services (DHHS) has established the Michigan Statewide Automated Child Welfare System (MiSACWIS), a database containing vital information regarding children and families involved in child protective services cases under that act; and

WHEREAS, a significant number of those cases involve children who are either tribal members or who are eligible for tribal membership in federally recognized Indian tribes; and

WHEREAS, pursuant to the Indian Child Welfare Act, 25 U.S.C. 1901 et seq, and the Michigan Indian Family Preservation Act, MCL 712.B1 et seq, each federally recognized Indian tribe in Michigan has a legitimate and vital need to access information contained in the MiSACWIS system related to those children who are members or who are eligible for membership in that Tribe; and

WHEREAS, despite previous policies to provide pre-removal petition information to Tribes and initial indications that DHHS would permit Tribes to access information in the

MiSACWIS system, related to their eligible children, DHHS has concluded that the Indian Tribes are not among those entities currently authorized by law to have such access; and

WHEREAS, a group of six Senators has now introduced SB 616, a bill that would correct this oversight and provide explicit legislative authorization permitting Tribes to access certain information housed in the MiCSAWIS database pertaining to children who are members of or who are eligible for membership in that Tribe; and

WHEREAS, UTM has reviewed SB 616 as introduced and concluded that it will accomplish its objective with the following substitute language:

"Amend page 5, line 20, by striking out all of subdivision (X) and inserting:

"(X) A TRIBAL REPRESENTATIVE, AGENCY, OR ORGANIZATION, INCLUDING A MULTIDISCIPLINARY TEAM, AUTHORIZED BY THE INDIAN CHILD'S TRIBE, AS DEFINED BY MCL 712B.3(l), TO CARE FOR, DIAGNOSE, TREAT, REVIEW, EVALUATE, OR MONITOR ACTIVE EFFORTS AS DESCRIBED WITHIN SECTION 3 OF CHAPTER XIIB OF THE PROBATE CODE OF 1939, 1939 PA 288, MCL 712B.3(a), REGARDING AN INDIAN CHILD, PARENT, OR INDIAN CUSTODIAN, AS DEFINED WITHIN MCL 712B.3.

THEREFORE, BE IT RESOLVED, that United Tribes of Michigan hereby expresses its strong support for a legislative fix to authorize MiCSAWIS access to a Tribe for information pertaining to children who are members of or who are eligible for membership in that Tribe. UTM urges the Michigan Legislature to pass SB 616 as amended above.

Adopted by a vote of __9__ in favor, __0__ against, __0__ abstaining, at a meeting of the United Tribes of Michigan held on October 12, 2017 at the Gun Lake Luella Collins Community Center, Shelbyville, Michigan.

Chairman Aaron Payment
UTM President

Chairperson Regina Gasco Bentley
UTM Secretary

TESTIMONY

Families, Children, and Seniors Committee ~ MI House of Representatives

Good morning. My name is Aaron Payment. I am Chairperson of the Sault Ste. Marie Tribe of Chippewa Indians. I testify today on behalf of my tribe regarding proposed legislation that would allow tribal access to pre-petition/pre-removal information regarding our children with whom the State of Michigan is: investigating; has substantiated an investigation; and is engaging in services. My Tribe supports the legislation going forward in the form as agreed to by the United Tribes of Michigan for which I also serve as President.

Background:

The Indian Child Welfare Act (ICWA) enacted in 1978 began to address a long-critical problem. For decades, non-Indian social workers typically evaluated Indian family problems from their own cultural biases. Ignorance or prejudice of our traditions and values, combined with racism and ethnocentrism, and forced assimilation resulted in the tragic separation of large numbers of Indian children from their families and tribal communities.

ICWA recognizes:

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed…; and

(5) that the States…have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families (25 USC 1901).

US Congressional policy as stated in ICWA is:

"To protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs" (25 USC 1902).

To bring an end to the separation of Indian children from their families, Congress affirmatively, purposefully, and dramatically restricted the role of the states in Indian child welfare proceedings; and affirmed and increased the role of tribes and their governmental units. (Myers, at 57). Although the number of Indian children removals have decreased since the enactment of ICWA, Indian child placements are

still multiples greater than for other children; proving that continued protections are necessary.

Research and data from states tell us that Native children are overrepresented in the child welfare system nationwide, especially in foster care. One study found that, our children are 2 X more likely to be investigated, 2 X more likely to have allegations of abuse substantiated, and 4 X more likely than Caucasian children to be placed in foster care. This is due in large part to systematic cultural bias; the kind that is demonstrated through purporting to know better than us what is in our Indian child's best interest.

The Michigan Indian Family Preservation Act REAFFIRMS that Indian tribes know what is in the best interests of their children. MCL 712B.5. "In Indian child custody proceedings, the best interests of the Indian child shall be determined, in consultation with the Indian child's tribe, in accordance with the Indian child welfare act. . ." MCL 712B.5. It jurisdictional that MDHHS consult with the Indian child's tribe when working with the child's family to offer preventative services, in preventing a removal, and when determining what is in the best

interests of Indian children. The proposed language would clarify to MDHHS their requirement to meaningfully engage in that consultation.

Current Issue:

Again, the law requires the state to involve the Indian child's tribe in efforts to prevent the breakup of Indian families that in the majority of cases would occur prior to removal. MDHHS, however, states they cannot provide tribes ANY information about the tribal families they are working with until a court action commences (MDHHS Communication Issuance 17-0065, May 30, 2017). Federal law, however, provides:

> [A]gencies of any Indian tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of children may provide information and records to those agencies of any Indian tribe, any State, or the Federal Government that need to know the information in performance of their duties. For purposes of this section, Indian tribal governments shall be treated the same as other Federal Government entities. (25 USC 3205)

The proposed language would clarify that such information is necessary, required, and jurisdictional.

Next, let's talk about Active Efforts of the State to work with Tribes at the pre-removal stage:

Access to pre-removal information is necessary in order for MDHHS to engage tribes through the provision of **active efforts** to prevent the breakup of the Indian family. Federal Rules (25 CFR 23) requires the State to engage the tribe through **active efforts** and make preventing removals one of the primary goals of the law. MCL 712B.3(a); 25 CFR 23.2 (81 FR 38865). Tribes, when engaged prior to a removal, can collaborate to prevent the breakup of its Indian families through discussions regarding culturally appropriate services. MCL 712B.3(a)(1).

The Final Rule states "active efforts means affirmative, active, thorough and timely efforts intended primarily to *maintain* or reunite an Indian child with his or her family." & "To the *maximum* extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe..." 25 CFR 23.2 (81FR 38865) (emphasis added).

Faulty interpretation of the law (that prevents tribes from having information prior to removals to exercise their rights and fulfill the tasks outlined in the law) IS responsible for MDHHS currently failing to perform it's duties under the law. This instrumentality of the State has indicated that it believes it is able to determine what the

culturally appropriate services are for each of the tribes in Michigan. This ideology is patently offensive, paternalistic and precisely why Congress enacted ICWA.

The proposed language allows each Indian tribe to determine based on their own customs, sovereignty, laws, structure, and concurrent jurisdiction over their citizens who within the tribe should be able to receive the child protection services information. When tribes are purposely excluded from information regarding our binogii or children, it is impossible to assert that active efforts to prevent removal were provided. MIFPA is meaningless without full and culturally appropriate implementation.

The Sault Tribe supports the proposed language to allow federally recognized Indian tribes to have access to the child protection services information and appreciates the opportunity to provide this information today. Finally, any additional changes or amendments are not advised as it risks losing ground and unraveling the goodwill this legislature demonstrated when it enacted the MIFPA.

Thank you.